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Judicial engineering in shaping the Union's legal order. A tale of combining, distinguishing and balancing norms

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Dear colleagues,
Ladies and gentlemen,

I am delighted to be here tonight to celebrate the 50th anniversary of the Edinburgh Europa Institute, which is amongst the longest-established European institutes dedicated to research on European integration.

As you remember, 1968 was a pivotal year in contemporary history: large-scale student and social movements prompted established political, academic and moral authorities to modernise society and "waive" the barriers which, they argued, slowed down progress. I cannot resist drawing an analogy between these aspirations and the European integration process. The very idea of a common market – the main, historical pillar of integration in the EU – is based on the

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elimination of legal, physical and technical barriers between the Member States. It is barely necessary to insist on the essential role that the Court of Justice has played in that process, particularly at times when political consensus only rarely existed within the Council to approximate the laws of the Member States.

A few decennia later, the European Union's action touches upon ever-increasing aspects of citizens' lives and undertakings' business. The very first President of the Court of Justice, Massimo Pilotti, could never have foreseen that the 2018 Court that I preside decides on issues as diverse and sensitive as global trade relationships of the EU, free movement rights of same-sex couples, European arrest warrants, safety measures applicable to dangerous chemicals, extradition of EU citizens to third States, genetically modified organisms or data protection in the digitalized world – and that list is far from exhaustive…

Defining what 'the law of the EU' is in a given case, which is the Court's main task according to Article 19(1) TEU, is of course not always easy. That is due in particular to the ever-increasing technicality of many acts of secondary EU law.

Tonight, I would like to give you an insight into the way that the Court of Justice constructs the reasoning that underpins its judicial decisions, and focus more specifically on how the Court deals with

interactions between various sources and rules of EU law. Landmark judgments recently delivered by the Grand Chamber show that the Court's ability to *combine, distinguish and balance competing or complementary EU norms* is seminal to its mission of delivering EU justice, whatever the area of EU law under consideration. The resulting clarification of how various EU norms relate to each other does not only contribute to the uniform interpretation and homogenous application of EU law; it also consolidates the Court's role as a *functional constitutional court* of the European Union.

Let me start illustrating that idea with the classical judicial function of **specifying, among various legal regimes, which one applies to a given situation, and thus clarifying those regimes' scope of application**. The judgments in *Asociación Profesional Elite Taxi*[1] and *Uber France*,[2] pronounced respectively in December of last year and April of this year, offer clear examples in the law of the internal market.

The cases concerned restrictions in Spanish and French law to the provision by Uber of its famous smartphone application enabling non-professional drivers using their own vehicle to connect with persons who wish to make urban journeys. In both cases, Uber was prosecuted for violating the requirement under national law to obtain a license prior to providing an urban taxi service. Uber – whose online

[1] Judgment of 20 December 2017, *Asociación Profesional Elite Taxi* (C-434/15, EU:C:2017:981).
[2] Judgment of 10 April 2018, *Uber France* (C-320/16, EU:C:2018:221).

service in those Member States is provided through a company established in the Netherlands – argued that the national rules at issue amounted to a restriction on the freedom to provide services in the EU, guaranteed by Article 56 TFEU and the Services Directive.[3] The referring courts (the Commercial Court No 3 in Barcelona and the Regional Court of Lille) however doubted that Uber could benefit from that freedom in the main proceedings as *transport services* are excluded from the scope of both Article 56 TFEU and the Services Directive. Guidance from the Court was therefore sought on whether Uber's intermediation service should be regarded as a 'transport service' or as an 'information society service' instead, within the meaning of the Directive on information society services.[4] The answer to that question had procedural implications as well because EU law requires from the Member States prior notification to the Commission of any 'technical regulation' on information society services.[5]

In both judgments, the Grand Chamber decided that the service which Uber provided through its smartphone application was more than an intermediation service and involved simultaneously an urban transport service. The Court emphasised first that that application *created* an offer of transport services that would not exist without it because it prompted non-professional drivers to transport persons intending to

[3] Directive 2006/12/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*O.J.* 2006, L 376, p. 36).
[4] Directive 200/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (*O.J.* 2000, L 178, p. 1).
[5] Article 8(1) of Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 (*O.J.* 1998, L 217, p. 18).

make an urban journey. Uber exercised moreover decisive influence over the conditions under which that service was provided by those drivers, for example by establishing the maximum fare or by exercising a certain control over the quality of vehicles. The intermediation service at issue was therefore part of an overall service *whose main component* was a *transport service*. That qualification had several legal implications. The most important one is that such service is not governed by the Services Directive nor Treaty rules concerning freedom to provide services. As there are furthermore no harmonising rules governing such an urban transport service, Member States may – at this stage of development of EU law – regulate (and indeed restrict) the conditions under which an intermediation service such as that provided by Uber is to be provided in conformity with the general rules of the FEU Treaty. In *Uber France*, the Court added that, as a result, such national rules cannot be regarded as a 'technical regulation on information society services' which Member States should notify to the Commission prior to its adoption.

In other cases, the Court **balances the effectiveness of EU acts with general principles of EU law**. The recent judgment in *Altun*[6] illustrates that important function in the context of free movement of workers.

[6] Judgment of 6 February 2018, *Altun e.a.* (C-359/16, EU:C:2018:63).

In that reference for a preliminary ruling, the Belgian Court of Cassation asked the Court whether the courts of the host Member State of a posted worker (in this case, Belgium) were entitled to disregard an 'E 101/A 1 certificate' delivered by the Member State of origin if elements tend to establish that the certificate was obtained or relied on fraudulently. That certificate aims to establish that a posted worker is properly registered with the social security scheme of the Member State in which the undertaking employing him is established. Regulation (EC) No 1408/71[7] thus put in place a scheme under which, subject to holding that certificate, the posted worker is allowed to work in the host Member State without having to be registered with the social security system of that latter state.

In the main proceedings, a Belgian company active in the construction sector outsourced all its work to companies established in Bulgaria, who posted workers to Belgium. A judicial investigation conducted in Bulgaria found that the Bulgarian companies did not have any significant activities there, although E 101 – or A 1 – certificates had been issued by the Bulgarian authorities. It therefore appeared that the conditions set out in EU law for delivering the certificates in question were not satisfied. Accordingly, the Belgian social inspection requested the Bulgarian authorities to reconsider or withdraw those certificates. Since the competent Bulgarian institution did not take the

[7] Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (*O.J.* 1997, L 28, p. 1).

results of the investigation into consideration in its reply, the Belgian authorities initiated legal proceedings against the employers in particular for failing to register the workers with the National Social Security Office in Belgium. The employers brought an appeal on a point of law against the judgment of the Court of Appeal of Antwerp convicting them. The doubts of the Court of Cassation resulted from previous case-law[8] in which the Court had decided that 'in so far as an E 101 (or A 1) certificate establishes a presumption that the worker concerned is properly registered with the social security system of the Member State in which the undertaking employing him is established, it is binding on the competent institution of the Member State in which that person actually works'. Such finding stemmed from the fact that the certification system is based on mutual trust between the competent institutions of the Member States concerned. However, should that mutual trust be *absolute*, with the consequence that a certificate is to be regarded as valid so long as it has not been withdrawn or annulled in the Member State of origin?

In answer to that question, the Court stressed that each Member State must carry out a diligent examination of the application of its own social security system. It follows that, if the institution of the Member State in which the employee concerned actually works expresses doubts as to the validity of the certificate, the institution of the Member State of origin should reconsider the grounds for its issue. If

[8] In particular, the Judgment of 27 April 2017, *A-Rosa Flussschiff* (C-620/15, EU:C:2017:309), point 39.

the disagreement subsists, it is open to the competent institutions to refer the matter to the administrative commission established in accordance with Regulation No 1408/71. In case that Commission fails to reconcile the points of view of the competent institutions, the Member State in which the employee concerned actually works may bring infringement proceedings under Article 259 TFEU, in order to enable the Court to determine which legislation applies to such an employee and, by implication, whether the information contained in the certificate at issue is accurate.

However, the Court went beyond those considerations and combined the EU secondary law scheme at issue with the general principle of EU law that fraud and abuse of rights are prohibited (*fraus omnia corrumpit*). If the institution of the Member State of origin fails to carry out on request of its counterpart in the host Member State a proper review of the challenged certificates, in the light of concrete evidence available to it, that evidence may serve as a basis for the judicial authorities of the latter Member State to disregard the certificates. The use of that general principle in the Court's reasoning thus nuanced existing case-law on Regulation No 1408/71 in order to address growing concerns about widespread fraud in the posting of workers in the European Union. That important clarification may in turn provide a useful source of inspiration for the EU legislature when reforming the EU regime on posted workers in the future.

As we know, free movement of persons is no longer a privilege of 'economic' migrants but also an EU citizenship right under Articles 20(2)(a) and 21(1) TFEU, supplemented by the Citizenship Directive.[9]

The recent judgment in *B and Vomero*[10] illustrates a situation in which the Court **horizontally combined various provisions of that Directive in order to interpret it consistently with its objectives**.

The main proceedings before the *Verwaltungsgerichtshof* Baden-Württemberg and the Supreme Court of the United Kingdom concerned expulsion orders adopted against EU citizens on whom a custodial sentence had been imposed in the host Member States (in these cases, Germany and the United Kingdom). The degree of protection against expulsion under the Citizenship Directive varies depending on how long the citizen concerned has resided in the host Member State. Thus, Article 28(3)(a) provides that an EU citizen enjoys increased protection against expulsion when he (or she) has resided in the host Member State for the previous ten years: in that case, expulsion is possible only on '*imperative* grounds of public security'.[11] If the citizen does not meet that 10-year residence condition, Article 28(2) enables the host Member State to deport him on '*serious* grounds of public policy or public security',[12] which

[9] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (*O.J.* 2004, L 158, p. 77).
[10] Judgment of 17 April 2018, *B and Vomero* (C-316/16 and C-424/16, EU:C:2018:256).
[11] Emphasis added.
[12] Emphasis added.

clearly covers a broader range of situations. In that latter case, however, the protection against expulsion is expressly conditional upon that person having a *right of permanent residence* in the host Member State (granted after five years of uninterrupted legal residence under the Citizenship Directive[13]).

In *B and Vomero*, the Court had to address two important issues.

Regarding first the case of *Vomero*, the Supreme Court of the United Kingdom asked whether the enhanced protection against expulsion offered by that provision is also subject to the condition that the person concerned has a *right of permanent residence* in the host Member State, despite the silence of Article 28(3)(a) of the Citizenship Directive in this respect.

The Court's answer illustrates the 'combination of norms' technique to which I referred above and enabled the Court to preserve the Directive's objectives. The Court held that, if permanent residence is a precondition to enjoy the "lower" protection against expulsion under Article 28(2), it is necessarily also a precondition to enjoy the enhanced protection set out in paragraph 3(a) of that Article – under which, as I said, expulsion is only possible on *imperative grounds* of public security. The Court therefore 'imported' in the latter provision a condition that formally appears in the former only. That is fully

[13] Article 16(1) of the Citizenship Directive.

consistent with the Citizenship Directive's objectives: considering that that directive is based on the *degree of integration* of the person concerned in the host Member State, the level of protection which it offers *increases* with the duration of residence in that State; the logical consequence is that the higher protection against expulsion granted to citizens having resided in the host Member State for the last ten years cannot be subject to less stringent conditions than those required to enjoy the lower protection granted to citizens not fulfilling that 10-year residence requirement.

It should be pointed out at this stage that, although the Supreme Court assumed in *Vomero* that that Italian national had *not* acquired a right of permanent residence in the United Kingdom, on the basis in particular of the judgment in *Onuekwere*,[14] the relevance of that judgment in the main proceedings was not entirely clear.

The judgment in *Onuekwere* concerned the consequences of imprisonment on the *acquisition* of the right of permanent residence under Article 16(1) of the Citizenship Directive. The Court decided that *periods of imprisonment cannot be taken into consideration* when assessing whether an EU citizen has acquired that right, which – as I said – is subject to five years of uninterrupted legal residence in the host Member State. The Court identified an even more radical consequence of such imprisonment prior to the acquisition of that

[14] Judgment of 16 January 2014, Onuekwere (C-378/12, EU:C:2014:13).

right: it *interrupts the continuity of legal residence* in the host Member State. In practice, it means that a new period of five years of uninterrupted legal residence has to be accomplished in that Member State *after* the person concerned has been released from jail. The Court's statement of reasons pointed to the fact that the imposition of a prison sentence by a national court is "such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law" and thus breaks the integrating links with that State.[15]

However, M. Vomero had been a resident in the United Kingdom since 1985 and had not been imprisoned before 2002. It is therefore not unthinkable – also in the light of the judgment in *Lassal*[16] – that M. Vomero *already met* the requirement of five years of uninterrupted legal residence in the United Kingdom when he started to execute his custodial sentence, and thus acquired a right of permanent residence on 30 April 2006 (the date on which the period prescribed for transposing the Citizenship Directive expired). The Supreme Court nevertheless did not seek any guidance from the Court on that issue and the judgment in *B and Vomero* therefore does not touch upon it.[17]

The questions which the *Verwaltungsgerichtshof* Baden-Württemberg raised in *B* concerned for their part the consequences of imprisonment

[15] Points 26 and 31 of the Judgment.
[16] Judgment of 7 October 2010, *Lassal* (C-162/09, EU:C:2010:592).
[17] The Court merely pointed to the fact that, since it did 'not have all the information necessary in order to assess the merits of the [Supreme Court's] premiss, it must be assumed […] that it is well founded'.

on the enhanced protection against expulsion granted to persons *having a right of permanent residence* in the host Member State. As the Court had made clear in *M.G.*,[18] once the right of permanent residence in the host Member State has been obtained, imprisonment *breaks in principle* the integrating link of the person concerned in that Member State and therefore interrupts the continuity of the 10-year period of residence to which Article 28(3)(a) of the Citizenship Directive refers. As the Court held, whether the person concerned may nonetheless enjoy the enhanced protection against expulsion pursuant to that provision depends on an overall assessment of his or her situation, aimed to determine whether the integrating links previously forged with the host Member State have been effectively broken by imprisonment.[19] The Court added that the duration of that person's residence in the host Member State prior to imprisonment is relevant in that assessment.

By its reference for a preliminary ruling in *B*, the *Verwaltungsgerichtshof* Baden-Württemberg sought to obtain further guidance from the Court on that 'overall assessment' of the situation of the person concerned. The case concerned a Greek national who had undeniably acquired a right of permanent residence in Germany, where he had been living since the age of 4. He had received a custodial sentence in 2013 for theft with violence and had been subsequently subject to an expulsion order. Did his imprisonment in

[18] Judgment of 16 January 2014, *M.G.* (C-400/12, EU:C:2014:9).
[19] *Ibid.*, point 36.

Germany *deprive him of he enhanced protection against expulsion* on the basis of Article 28(3)(a) (under which, I repeat, expulsion is possible only on 'imperative grounds of public security)? The answer to that question was essential in the main proceedings because the referring court found that *no imperative grounds of public security* arose in the circumstances of the case before it.[20]

Here also, the Court's answer confirms the close relationship between rights granted under the Citizenship Directive and the integrating links developed by the person concerned in the host Member State. The Court elaborated further its reasoning in *M.G.* and applied by analogy its reasoning in *Tsakouridis*,[21] which concerned the issues whether and to what extent *absences* from the host Member State are liable to interrupt the 10-year period of residence for the purposes of acquiring and maintaining the enhanced protection against expulsion. It decided that the fact that a person having a right of permanent residence in the host Member State is imprisoned *does not automatically break his or her integrating links with that State*. National authorities are requested to carry out an overall assessment of the situation at the precise time when the question of expulsion arises, taking into account the duration of residence and the strength of the integrating links forged in the host Member State prior to imprisonment as well as the nature of the offence, the circumstances in which that offence was committed and the behaviour of the person concerned during detention. The Court

[20] Judgment of 17 April 2018, *B and Vomero* (C-316/16 and C-424/16, EU:C:2018:256), point 20.
[21] Judgment of 23 November 2010, *Tsakouridis* (C‑145/09, EU:C:2010:708).

pointed out in that context that the social rehabilitation of an EU citizen in the Member State in which he or she is genuinely integrated is not only in his or her interest but also in the interest of the EU itself.

The judgment in *Coman*[22], delivered on 5 June of this year, arose in a very different – although not less sensitive – context and illustrates for its part the **vertical interplay between the Citizenship Directive and EU primary law**. The applicants in the main proceedings formed a same-sex couple and were married under Belgian law. The couple sought to obtain long-term residence in Romania, the Member State of which one of the applicants was a national. However, the other applicant was a US citizen and therefore did not qualify as an EU citizen. Moreover, Romanian law did not recognise marriage between persons of the same sex and therefore denied the US citizen the status of 'spouse' of an EU citizen enjoying derived residence rights under Article 7(2) of the Citizenship Directive. In other words, Romanian authorities denied that US citizen long-term residence on the basis of family reunification. The Constitutional Court of Romania referred several questions to the Court on the degree of protection offered by the Citizenship Directive in that context.

The Court held in the first place that the Citizenship Directive did not apply in the main proceedings. That directive only governs the conditions of entry and stay of an EU citizen (and his family

[22] Judgment of 5 June 2018, Coman and Others (C‑673/16, EU:C:2018:385).

members) *in Member States other than that of which he is a national*.[23] By contrast, the main proceedings concerned residence rights in Romania of the family member of a Romanian national. However, the Court reminded that third-country nationals not enjoying a derived residence right under the Citizenship Directive may in certain situations obtain such right on grounds of Article 21(1) TFEU. That happens when the citizen of the Union has developed or consolidated with that third-country national a family life in a Member State other than that of which he is a national and wishes to pursue that family life when returning to his Member State of origin. Applying rights guaranteed under the Citizenship Directive by analogy, the Court held that a 'spouse' within the meaning of that directive is any person married to another person, and that the directive does not refer to national law for defining what the concept of 'marriage' covers. Whilst the Member States remain competent as regards personal status, they must exercise that competence in compliance with EU law. Allowing a Member State to refuse the status of spouses to same-sex couples legally married in another Member State would result in variations of free movement rights in the EU depending on whether the former Member State recognises same-sex marriage. That would undermine the objectives of the Citizenship Directive and, by extension, those of Article 21(1) TFEU.

[23] See, for example, the judgment of 12 March 2014, *O. and B.* (C-456/12, EU:C:2014:135), para. 37.

As regards justification, the Court rejected the argument of some Member States that a restriction such as that in the main proceedings is necessary to protect their conception of marriage as a union between a man and a woman or even to protect public order and national identity within the meaning of Article 4(2) TEU. The protection offered by EU citizenship in a situation such as that in the main proceedings neither encroaches on the competence retained by each Member State to develop its own policy as regards marriage nor disregards the national identity of the Member States. The Court emphasised moreover that Member States must comply with the right to private and family life guaranteed by Article 7 of the Charter when they adopt measures entailing a restriction to the free movement of persons, and that it results from the case-law of the ECtHR that same-sex relationships may enjoy the same protection in this respect than relationships between men and women.

The Court's reasoning in that judgment is remarkable in that it illustrates *convergence* in the degree of protection of the citizenship right to move and reside freely within the territory of the Member States *inside and outside* the scope of the Citizenship Directive. That was made possible not only by inferring from that directive certain principles that are applicable to Article 21(1) TFEU but also by using in the judicial reasoning the fundamental right to private and family life when examining possible justifications to the restriction at issue.

Let me turn now to EU competition law. EU courts have also played a seminal role in that area and **balanced the effectiveness of the general antitrust rules set out in Articles 101 and 102 TFEU with two essential guarantees** for the undertakings concerned. On the one hand, the undertakings subject to an investigation are entitled to a *fair trial*. On the other hand, the Commission's power to fine undertakings pursuant to Regulation (EC) No 1/2003[24] is justified only if the Commission *proves* the anticompetitive conduct at issue.
Both aspects are again illustrated by the Court's Grand Chamber judgment of last year in the famous *Intel* case.[25]

The proceedings before EU courts stemmed from a 2009 Commission decision in which Intel had been held liable for an abuse of dominance in the market for processors, within the meaning of Article 102 TFEU. In the Commission's view, Intel had disregarded that provision by granting rebates to computer manufacturers conditional on purchasing all or almost all their processors from Intel (instead of its main competitor) and by making payments on those manufacturers to postpone, restrict or even cancel the marketing of products equipped with processors from Intel's main competitor.

Intel challenged in particular the fact that the Commission had conducted during the investigation a five-hour interview with an

[24] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*O.J.* 2003, L 1, p. 1), Article 23.
[25] Judgment of 6 September 2017, *Intel v Commission* (C-413/14 P, EU:C:2017:632).

important client's senior executive without recording it. Intel argued that that interview might have contained exculpatory evidence that could have served its defence. The fact that no recording of that interview was available amounted, in Intel's view, to a violation of Article 19 of Regulation No 1/2003 as well as the Implementing Regulation.[26] The General Court had rejected that plea by distinguishing 'formal' and 'informal' interviews. The Court overruled that reasoning: the EU legislature intended to subject the Commission's power to take statements to *all interviews* which it conducts during an investigation. The Court moreover interpreted the implementing regulation to the effect that all such interviews *should be recorded*.[27] That finding is essential because it enables the undertakings subject to an investigation to verify possible inculpatory evidence inferred from the interview or, on the contrary, make sure that the Commission has sufficiently taken into account any exculpatory evidence which may have been provided on that occasion.

However, the Court held that that procedural irregularity did not result in a violation of Intel's rights of the defense warranting annulment of the judgment under appeal and, by implication, of the contested decision. Although the interview had not been recorded, Intel had obtained during the administrative procedure copy of an internal note from the Commission relating to that interview as well as a follow-up

[26] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (*O.J.* 2004, L 123, p. 18).
[27] Judgment in *Intel*, cited above, paras 84 to 93.

document containing written answers given by Intel's client to the same questions as those put orally to its senior executive during the interview. Furthermore, Intel had not established – nor attempted to establish – that that person had provided the Commission with exculpatory evidence during that interview, which might have influenced the Commission's findings in the contested decision.

As regards the burden of proof, the Court rejected the General Court's approach that loyalty rebates granted by Intel were abusive *per se*. When faced during the administrative procedure with a submission by the undertaking concerned, on the basis of supportive evidence, that its loyalty rebates were not capable of producing foreclosure effects, the Commission has to analyse the circumstances of the case and establish that those rebates could effectively restrict competition. In practice, the Commission must therefore establish in such a case the existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market. Moreover, when it manages to do so, the Commission should verify whether the exclusionary effect arising from the system of rebates at issue is not counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.[28]

The *Intel* judgment illustrates the high standards which the Court imposes on the Commission both in terms of procedural guarantees

[28] *Idem*, paras 139 and 140.

and proof of the alleged anticompetitive conduct. At the same time, however, the Court confirmed its settled case-law that any procedural irregularity – that is, a violation of the procedural rules set out in Regulation 1/2003 or in the Implementing Regulation – does not amount automatically to a violation of the rights of the defence guaranteed under Article 48 of the Charter, justifying to annul the decision at issue. The Court thus strikes a balance here between the guarantees offered to the undertakings concerned with the objective of ensuring effectiveness of the rules on competition in Articles 101 and 102 TFEU.

Another aspect of the Court's multifaceted role in clarifying the relationship between different legal sources concerns the **relevance of international law** when interpreting certain EU acts. It follows from Article 3(5) TEU that the European Union must contribute to the strict observance and the development of international law. Accordingly, the European Union is bound to observe international law which is binding upon its institutions when the latter adopt EU acts.[29] Such acts should therefore be interpreted, and their scope delimited, in the light of the relevant rules of international law.[30]

[29] See judgment of 21 December 2011, *Air Transport Association of America and Others* (C-366/10, EU:C:2011:864), para. 101 and case-law cited.

[30] See for example the judgments of 16 June 1998, *Racke* (C-162/96, EU:C:1998:293), paras 45 and 46, of 16 October 2012, *Hungary v Slovakia* (C-364/10, EU:C:2012:630), para. 44, and of 15 January 2015, *Evans* (C-179/13, EU:C:2015:12), para. 35.

That was again confirmed in the judgment of the Grand Chamber in *Lounani*,[31] a case concerning asylum and migration. The Belgian Council of State sought guidance from the Court, in essence, on circumstances in which a third-country national should be excluded from being a refugee within the meaning of the Qualification Directive,[32] based on Article 12(2) and (3) of that directive, because he was found guilty of acts contrary to the purposes and principles of the United Nations. In the main proceedings, Mr Lounani had been found guilty by a criminal court in Belgium of participation in the activities of the Belgian cell of a Moroccan terrorist group. That participation involved acts such as providing logistical support to the terrorist group, forgery of passports and organisation of a network for sending volunteers to Irak. Mr Lounani subsequently applied for refugee status in Belgium, claiming that he feared persecution if he returned to Morocco. In his view, the Moroccan authorities would regard him as a radical Islamist and jihadist as a result of his conviction in Belgium. Mr Lounani successfully challenged in court the refusal by Belgian authorities to grant him refugee status because of that conviction. The first instance court held in essence that the acts which formed the basis of the conviction did not amount to 'terrorist acts' and therefore did not reach a degree of gravity such as to trigger the exclusionary clause in Article 12 of the Qualification Directive.

[31] Judgment of 31 January 2017, *Lounani* (C-573/14, EU:C:2017:71).

[32] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (*O.J.* 2004, L 304, p. 12).

The Belgian Commissioner General for Refugees and Stateless Persons appealed that judgment before the Council of State, which referred two main questions for a preliminary ruling. First, it had doubts whether that exclusionary clause, which refers to 'acts contrary to the purposes and principles of the United Nations', applies only where the applicant for international protection has been convicted of one of the 'terrorist offences' referred to in Article 1(1) of Framework Decision 2002/475 on combating terrorism.[33] That legal qualification is limited in essence to participation in a terrorist act as such and does not extend therefore to mere support offered to the authors of such act. The Court answered that first question in the negative. Article 12 of the Qualification Directive has to be interpreted consistently with the corresponding provision of the Geneva Convention relating to the status of Refugees.[34] The Court referred to UN Security Council resolutions from which it appeared that 'acts contrary to the purposes and principles of the United Nations' are not confined to the commission of terrorist acts but extend more generally to the financing, planning and preparation of, or any other form of support for, terrorist acts. Second, the referring court asked the Court whether the fact that the applicant in the main proceedings had not been convicted for committing, attempting to commit, or threatening to commit a terrorist act precluded the exclusionary clause from applying. In its answer, the Court referred again to international law. It

[33] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (*O.J.* 2002, L 164, p. 3).
[34] Convention signed in Geneva on 28 July 1951, *United Nations Treaty Series*, vol. 189, p. 150, No 2545 (1954).

emphasised that in Resolution 2178 (2014),[35] the UN Security Council made it clear that the fight against terrorism at international level is not confined to terrorist acts as such but involves the prevention and suppression of all activities consisting in recruitment, organisation, transportation or equipment of individuals who travel with a view to perpetrate, plan or prepare terrorist acts. Although the Court left it for national authorities, subject to review by the national courts, to assess the facts in the main proceedings, it held in essence that Mr Lounani's logistical support to the activities of a terrorist group which operated internationally could justify denying him refugee status.

In other circumstances, **consistent interpretation of an EU act with international law may even clear doubts concerning its validity**. That is exactly what happened in *Western Sahara Campaign*,[36] a case relating to the external relations of the EU.

In this reference for a preliminary ruling from the High Court of England and Wales, Queen's Bench Division, the Court was asked in essence whether the Fisheries Partnership Agreement between the EU and Morocco[37] and its 2013 Protocol setting out fishing opportunities[38] were invalid in so far as they applied to Western

[35] Adopted by the Security Council at its 7272nd meeting on 24 September 2014.
[36] Judgment of 27 February 2018, *Western Sahara Campaign UK* (C-266/16, EU:C:2018:118).
[37] *O.J.* 2006 L 141, p. 4. That agreement was approved and implemented by Council Regulation (EC) No 764/2006 of 22 May 2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (*O.J.* 2006, L 141, p. 1).
[38] Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (*O.J.* 2013, L 349, p. 1).

Sahara, a disputed territory south of Morocco. The international community does not recognise Morocco's sovereignty over that territory. Western Sahara Campaign, a voluntary organisation supporting the recognition of the right of the people of Western Sahara to self-determination, opposed various measures whereby the United Kingdom implemented the Agreement and the Protocol to the extent that they applied to that disputed territory and the waters adjacent to it. The association argued that including them in the scope of application of those acts was manifestly incompatible with various rules of international law, namely the right to self-determination, Article 73 of the Charter of the United Nations, the provisions of the Convention on the Law of the Sea[39] and the obligations incumbent on States and other subjects of international law to bring to an end serious breaches of a peremptory norm of international law, not to recognise an illegal situation resulting from such a breach, and not to provide assistance for the commission of an internationally wrongful act.

However, the Court did not have to address any of those compatibility issues in its judgment delivered last 27 February. Just as it did in its judgment of 21 December 2016 in *Council v Front Polisario*,[40] which concerned the Association Agreement with Morocco[41] and the

[39] United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982 (United Nations Treaty Series, Vol. 1833, 1834 and 1835, p. 3), approved on behalf of the Community by Council Decision 98/392/EC of 23 March 1998 (*O.J.* 1998, L 179, p. 1).
[40] C-104/16 P, EU:C:2016:973, para. 116.
[41] Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, signed in Brussels on 26 February 1996 (*O.J.* 2000, L 70, p. 2), approved on behalf of the European Communities by Council and Commission Decision 2000/204/EC, ECSC of 24 January 2000 (*O.J.* 2000, L 70, p. 228).

Liberalisation Agreement between Morocco and the European Union,[42] the Court held that the premiss on which those issues were raised was incorrect: neither the Fisheries Partnership Agreement nor its 2013 Protocol applied to Western Sahara or the waters adjacent to it.

The Court reached that conclusion after interpreting the expressions 'the territory of Morocco and […] the waters under Moroccan jurisdiction', 'the waters falling within the sovereignty or jurisdiction of the Kingdom of Morocco' and 'Moroccan fishing zone' used in those acts in the light of customary rules on the interpretation of treaties reflected in Article 31 of the Vienna Convention on the Law of Treaties[43] and the Convention on the Law of the Sea.

Concerning first the concept of 'territory of Morocco', the Court emphasised that it should be interpreted consistently in the Fisheries Partnership Agreement and in the Association Agreement with Morocco, as both form part of one single body of agreements. That resulted clearly from Article 1 of the 2013 Protocol, a 'subsequent agreement' between the parties within the meaning of Article 31(3)(a) of the Vienna Convention and therefore relevant for interpreting the

[42] Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols No 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, signed in Brussels on 13 December 2010 (*O.J.* 2012 L 241, p. 4) and approved by Council Decision 2012/497/EU of 8 March 2012 (*O.J.* 2012 L 241, p. 2).

[43] That provision contains general rules on the interpretation of treaties/international agreements.

Fisheries Partnership Agreement. The Court repeated here its finding in *Council v. Front Polisario* that the 'territory of Morocco' only relates to 'the geographical area on which the Kingdom of Morocco exercises the fullness of the powers granted to sovereign entities by international law', thus to the exclusion of Western Sahara. A different approach would be in breach of the principle of self-determination and the principle of the relative effect of the treaties (*pacta tertiis nec nocent nec prosunt*).[44]

As regards next the concept of 'waters falling within the sovereignty or jurisdiction' of Morocco, the Court observed that it is not used in the Association Agreement with Morocco. That concept, which had therefore not been interpreted in *Council v. Front Polisario*, is to be construed in the light of the Convention on the Law of the Sea. The Court held in essence that the latter convention distinguished the 'territorial sea', that is to say a belt of sea directly adjacent to the coastal State's land territory and inland waters on which it exercises sovereignty, and the 'exclusive economic zone', namely an area beyond and adjacent to the territorial sea on which the coastal State has jurisdiction and certain rights. As Western Sahara is not part of Morocco's territory, the waters adjacent to it neither form part of the waters on which that State exercises sovereignty nor on which it has jurisdiction. The Court added that nothing in the file suggested the existence of the parties' intention to give those concepts a special

[44] That principle finds a specific expression in Article 34 of the Vienna Convention.

meaning pursuant to Article 31(4) of the Vienna Convention. That interpretation was applicable *mutatis mutandis* to the concept of 'Moroccan fishing zone' used in both the Fisheries Partnership Agreement and in the 2013 Protocol.

Lastly, the conclusion that the 2013 Protocol does not apply to Western Sahara and the waters adjacent to it is not called into question by the fact that Morocco, in accordance with a requirement set out in that protocol, notified to the Commission geographical coordinates including waters adjacent to that disputed territory following the Protocol's entry into force. Those coordinates did not form part of the text of the protocol, as agreed by the parties, and could not in any event extend the scope of the protocol so as to include the waters adjacent to the territory of Western Sahara.

It is now time to conclude briefly. All cases that I mentioned illustrate that the Court's role to say 'what the law of the EU is' involves addressing a wide variety of sensitive issues, including changes in the patterns of the economy, the recognition of new forms of family life, cross-border fraud, or restrictions to international protection based on an asylum seeker's criminal record. A significant aspect of the judicial reasoning in that context, whatever the area under consideration, consists in combining, distinguishing and frequently also balancing various sources of EU law, building upon the methods of interpretation which the Court has developed in its case-law. As these

demonstrate, clarifying the relationship between various EU rules is often pivotal not only in order to define their scope of application but also to balance the objectives that they pursue, determine their precise normative content and, as the case may be, ensure their consistency with rules enjoying higher ranking in the EU legal order. That multifaceted contribution of the Court forms an integral part of its constitutional mission to shape the EU legal order. It offers moreover useful guidance to the political institutions of the Union on the framework within which EU policies can further develop in each area of EU competence.